Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd

HIGH COURT (BRUNEI) — ORIGINATING SUMMONS NO 54 OF 1995
ROBERTS CJ
14 FEBRUARY 1996

Banking *— Banks and banking business — Bankers' books — Discovery and inspection of bank accounts — When court empowered to order inspection and taking of copies under Bankers' Books (Evidence) Act (Cap 107) ss 6 & 7*

The plaintiff claimed to have purchased from the defendant 13 bank drafts totalling A$41,700 between August 1987 and September 1989. All the bank drafts were in favour of her son with the exception of one draft which was purchased in favour of the plaintiff herself. The plaintiff alleged that all these drafts were received by her son who informed her that every one of them had been paid by him into the Westpac Bank in Melbourne where the plaintiff had a joint account. She further alleged that her accounts at the Westpac Bank did not reveal that 13 deposits were made by her or her son, representing the value of the missing drafts. The plaintiff applied by originating summons for an order under s 7 of the Bankers' Books (Evidence) Act (Cap 107) ('the Act') to inspect and take copies of entries in the vostro accounts and ledger accounts relating to the bank drafts allegedly purchased by her from the defendant. The plaintiff's application came before the registrar who dismissed it on the ground that s 7 of the Act is not intended to be a discovery tool and that there must be a separate legal proceeding in existence. The plaintiff appealed against this decision.

Held, dismissing the plaintiff's appeal:

(1) The Act, which is based on the UK Bankers' Books (Evidence) Act, is designed for the protection of bankers and its main purpose is to enable copies of entries in bankers' books to be received as prima facie evidence of that entry (see p 137B).

(2) Before a court is empowered to order the inspection and taking of copies of any entries in a banker's book, there must be an application by a 'party to a legal proceeeding'. Although s 7 of the Act is not in terms restricted to other legal proceedings, nevertheless there is no doubt that this is the object of the Act. Thus before an order under s 7 of the Act is made in favour of an applicant, the applicant must first show that he is a party to separate legal proceedings (see pp 137F, 138C, E).

(3) The Act is not intended to provide an alternative method of discovery for a litigant who seeks to bring legal proceedings against the bank itself. Where the bank itself is a defendant an order for discovery should be made under the provision of the Brunei High Court Rules 1990. Section 7 of the Act is not to be

used to enable any party to those proceedings to inspect the defendant's books, in order to provide evidence such as will justify proceeding against the bank (see pp 138C–D); *Williams v Summerfield* [1972] 2 QB 512 followed.

[Bahasa Malaysia summary

Plaintif mengatakan bahawa beliau telah membeli daripada defendan 13 deraf bank berjumlah A$41,700 di antara Ogos 1987 dan September 1989. Kesemua deraf-deraf bank itu adalah di atas nama anak lelakinya kecuali satu deraf yang dibeli di atas nama plaintif sendiri. Plaintiff mengatakan bahawa kesemua deraf-deraf ini telah diterima oleh anak lelakinya yang memberitahunya bahawa setiap satu telah dibayar oleh beliau ke dalam Westpac Bank di Melbourne di mana plaintif mempunyai satu akaun bersama. Plaintiff seterusnya mengatakan bahawa akaunnya di Westpac Bank tidak menunjukkan bahawa 13 deposit telah dibuat olehnya atau anak lelakinya, iaitu yang merupakan nilai deraf-deraf yang hilang. Plaintiff telah memohon melalui saman pemula untuk satu perintah di bawah s 7 Akta Buku Banker (Keterangan) (Bab 107) ('Akta itu') untuk memeriksa dan mengambil salinan catatan-catatan di dalam akaun vostro dan akaun lejar berhubung dengan deraf-deraf bank A$ yang dikatakan dibeli olehnya daripada defendan. Permohonan plaintif dihadapkan kepada pendaftar yang menolak permohonan plaintif di atas alasan bahawa s 7 Akta itu tidak diniatkan sebagai alat penzahiran dan bahawa mestilah terdapat satu prosiding undang-undang berasingan yang wujud. Plaintif merayu terhadap keputusan ini.

Diputuskan, menolak rayuan plaintif:

(1) Akta itu, yang berdasarkan kepada Akta Buku Banker (Keterangan) UK direka untuk perlindungan banker-banker dan tujuan utamanya adalah untuk membolehkan salinan-salinan catatan-catatan di dalam buku-buku banker diterima sebagai keterangan prima facie catatan tersebut (lihat ms 137B).

(2) Sebelum mahkamah diberikuasa untuk memerintahkan pemeriksaan dan pengambilan salinan-salinan catatan-catatan di dalam buku banker, seharusnya ada satu permohonan oleh satu 'pihak kepada prosiding undang-undang'. Walaupun s 7 Akta itu tidaklah di dalam terma-terma terhad kepada prosiding-prosiding undang-undang yang lain, namun demikian tidak ada keraguan bahawa ini adalah objek Akta itu. Oleh yang demikian sebelum satu perintah dibawah s 7 Akta itu dibuat memihak seorang pemohon, pemohon itu mesti pada permulaannya menunjukkan bahawa dia adalah satu pihak kepada suatu prosiding undang-undang yang berasingan (lihat ms 137F, 138C, E).

(3) Akta itu tidak diniatkan untuk memberi satu kaedah alternatif penzahiran kepada litigan yang ingin membawa prosiding-prosiding undang-undang terhadap bank itu sendiri.

Di mana bank sendiri adalah satu defendan suatu perintah untuk penzahiran sepatutnya dibuat di bawah Kaedah-Kaedah Mahkamah Tinggi Brunei 1990. Seksyen 7 Akta itu tidak seharusnya digunakan untuk membolehkan mana-mana pihak kepada prosiding-prosiding itu untuk memeriksa buku-buku defendan bagi tujuan membekalkan keterangan yang memberi justifikasi untuk bertindak terhadap bank (lihat ms 138C–D); *Williams v Summerfield* [1972] 2 QB 512 diikut.]

Notes

For a case on discovery and inspection of bankers' books see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1064.

Case referred to

Williams v Summerfield [1972] 2 QB 512

Legislation referred to

Bankers' Books (Evidence) Act ss 6, 7 [Brunei]
Rules of the High Court 1990 [Brunei]

Chan Swee Leng (in person) as the appellant/plaintiff.
Siva Sankaran for the respondent/defendant.

Cur Adv Vult

Roberts CJ:

Preliminary

Madam Chan Swee Leng ('the plaintiff') applied by originating summons for an order under s 7 of the Bankers' Books (Evidence) Act (Cap 107) ('the Act').

She sought under that section to inspect and take copies of entries in the vostro accounts and ledger accounts, relating to A$ bank drafts said to have been purchased by the plaintiff from the Hongkong and Shanghai Bank ('the defendant').

The registrar, before whom the plaintiff's application came, had before him two affidavits sworn by the plaintiff herself and one sworn by Mr MJ Pike, of the defendant bank. No further affidavits were put before me on appeal.

The registrar dismissed the application of the plaintiff on the ground that s 7 of the Act is not intended to be 'a discovery tool' and that there must be a separate legal proceeding in existence.

The plaintiff has appealed against this decision.

Background

The plaintiff asserts that she purchased, between August 1987 and September 1989, 13 bank drafts from the defendant in favour of her son,

with the exception of one draft which was purchased in favour of herself. These were of a total in value of A$41,700. A

According to the plaintiff's affidavit, all these drafts were received by her son, Galvin Chin, who informed her that every one of them had been paid by him into the Westpac Bank in Melbourne.

According to Mrs Chan, she had opened a joint account at Westpac, in Melbourne. This would entitle her to obtain from that bank copies of this account, which should show any sums which were paid by herself or her son into that bank and the dates on which such deposits were made. B

Mrs Chan says that she has been provided with copies of her bank accounts at Westpac during the appropriate period, but that such accounts did not reveal that 13 deposits were made by her or her son, representing the proceeds of the missing drafts. C

The bank has suggested that, if these sums were not paid into Westpac, either the plaintiff did not purchase the drafts or they were not presented to Westpac by her son.

D

I suppose it is possible that there may have been a mistake and that one of the drafts paid into Westpac may not have been credited correctly. It seems highly unlikely that 13 drafts would have been paid into Westpac and not recorded.

The plaintiff has not produced any receipts, either of drafts purchased in Brunei or of sums deposited at Westpac. This has not made it easier to trace what happened to the missing drafts. E

She has, however, pursued her grievance vigorously, if somewhat intermittently. She has, I fear, convinced herself that the defendant has deliberately concealed her drafts and that she has suffered a serious loss in consequence. F

The defendant has carried out on various occasions searches of its records, using the draft numbers provided by the plaintiff, without result.

Finally, in 1995, the defendant asked Peat Marwick, a well-respected firm of chartered accountants and registered auditors, to examine again the bank drafts bearing the numbers which she asked to be investigated in the period of 1987 to 1989. G

Peat Marwick reported, on 12 June 1995, that 'on the basis of the information given to us and the work done, we have not found any bank draft which has been cancelled and reissued in her name nor has any cancelled draft been cleared through the vostro account'. H

The defendant appears to me to have done all it could fairly be expected to do to try to trace the bank drafts which the plaintiff thinks she had purchased.

The main question which I have to answer, however, is whether, in any event, I have the power to do what is sought by the plaintiff, namely the inspection of the defendant's vostro (or nostro) accounts and the taking of copies of some of the entries in it. I

Bankers' Books (Evidence) Act (Cap 107)

The application is brought under s 7 of the Act. It is important to remember that, whether or not I consider that there are merits in this claim, I must decide whether I have any power, under that section, to order the inspection of the vostro account by the plaintiff.

The Act, which is based on the UK Bankers' Books (Evidence) Act, is designed for the protection of bankers. Its main purpose is to enable copies of entries in bankers' books to be received as prima facie evidence of that entry.

Section 6 of the Act, indeed, provides that an officer of the bank shall not, in any legal proceedings to which the bank is not a party be compellable to produce any bankers' books if the contents of these can be proved under the Act.

Section 7 of the Act is in these terms:

> (1) On the application of any party to a legal proceeding the Court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.
>
> (2) An order under this section may be made either on or without summoning the bank or any other party and shall be served on the bank 3 clear days before the same is to be obeyed unless the Court or judge otherwise directs.

What Does 'Legal Proceeding' Mean?

The phrase 'legal proceeding' is used in s 7 of the Act. Before a court has power to order the inspection and taking of copies of any entries in a banker's book, there must be an application by a 'party to a legal proceeding'.

The plaintiff is, in a sense, a party to legal proceedings. These are defined in the Act, as meaning any civil or criminal proceeding or enquiry in which evidence is, or may be, given and includes an arbitration. I have no doubt that the wide terms of this definition will include an originating summons or motion taken out under the Brunei Rules of the High Court 1990 ('the BRHC') or otherwise.

The plaintiff, however, is seeking to use against the bank, an Act which was passed for the benefit of banks to enable them to produce copies of the entries in their books, instead of the books themselves, in order to avoid the disruption of the bank which would result if the original books had to be taken to court.

It is clear from *Williams v Summerfield* [1972] 2 QB 512, that, as Lord Widgery LCJ said, at p 518:

> The effect of the judgment in *Bono*'s case (*R v Bono* (1913) 29 TLR 635) and other authorities is that the courts have set their face against s 7 being used as a kind of searching inquiry or fishing expedition beyond the ordinary rules of discovery.

> In civil proceedings the normal approach to the use of s 7 is that documents which would be discoverable, under the ordinary rules applicable thereto, are not to be disclosed by a side wind, as it were, by the application of s 7.

Lord Widgery further deprecated (in relation to criminal proceedings) the use of an application under s 7 as a fishing expedition in the hope of finding some material upon which a charge could be hung. The same principle will, in my judgment, apply to civil proceedings as well.

Although s 7 of the Act is not in terms restricted to other legal proceedings, I have no doubt that this is the object of the Act. It is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them.

The Act is not intended to provide an alternative method of discovery for a litigant who seeks to bring legal proceedings against the bank itself.

Where the bank is itself a defendant, there is provision for an order for discovery to be made under the BHCR. Section 7 is not to be used to enable any party to those proceedings to inspect the defendant's books, in order to provide evidence such as will justify proceeding against the bank.

In summary, the applicant, before an order is made in his favour under s 7 of the Act for the inspection of a ledger kept by the bank, must first show that he is a party to separate legal proceedings.

This the plaintiff has failed to do. I must therefore dismiss the appeal. I should add that, in any event, even if I had found that an order could be made under s 7 of the Act in the circumstances of this application, I would still have had to exercise a discretion in the plaintiff's favour, which I would not have been prepared to do.

The appellant (Madam Chan) must pay the costs of this appeal, which I assess at B$500.

The award of B$500 to the bank, for the hearing before the registrar, will remain.

Appeal dismissed.

Reported by Andrew Christopher Simon